FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 256

ALASKA STEAMSHIP COMPANY, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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August 5, 1958

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Alaska Steamship Company, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Claims entered in the above case January 15, 1958, as amended on petition for rehearing by order dated May 7, 1958.

OPINION BELOW AND JURISDICTION

The opinion of the Court of Claims was rendered January 15, 1958 (R. 281),* and an order dated

* References are to the certified transcript of record in the court below, filed with the Clerk pursuant to Rule 21(1) of this Court.

May 7, 1958 (R. 300) amending the opinion, was entered on petition for rehearing. Neither is yet reported. The opinion and order are contained in Appendix A hereto, pp. 1a-8a.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

In section 3(d) of the Merchant Ship Sales Act of 1946, 60 Stat. 41, 50 U.S.C., App. 1736(d), Congress fixed the "statutory sales price" at which, subject to specified upward or downward adjustments, Government vessels were to be sold to qualified applicants. The same section also specified a "floor price" below which the statutory sales price could not be reduced by the prescribed adjustments. Congress had assumed that the floor price in all cases would be lower than the statutory sales price. The reverse turned out to be the fact in the instant case and a few others. The Court of Claims held, although the statute directed otherwise, that the floor price superseded the statutory sales price because that is what Congress probably would have intended if it had considered this possibility.

The basic question presented is whether it was error for the Court of Claims to substitute an assumed intent for the intent which it found to be plainly spelled out in the statute and the legislative history. The Court, finding that Congress had failed to anticipate the specific facts presented by this case held, on the basis of post-enactment occurrences of dubious and inconclusive significance, that Congress would have intended the contrary of what the statute provided if the problem had been considered; this, notwithstanding

that the Court itself found the assumed intent to be contrary to policies of the Act.

The Government contends that at least $6,000,000 is involved in this question of statutory construction (R. 26, 248, 249, 254-5). There are several cases pending in the Court of Claims and elsewhere which may be affected by this case (R. 249).

STATUTE INVOLVED

The statute here involved is the Merchant Ship Sales Act of 1946, 60 Stat. 41, 50 U.S.C. App. 1735. Its relevant provisions are set forth in Appendix B hereto, pp. 8a-11a.

STATEMENT OF CASE

In July 1948, petitioner purchased a C1-M-AV1 type vessel called the TERMINAL KNOT from the United States Maritime Commission (hereinafter the "Commission") under the provisions of the Merchant Ship Sales Act of 1946 (hereinafter the "Act"). The Commission charged petitioner $693,862 for the vessel, which was the so-called "floor price" fixed by the Commission under the last paragraph of section 3(d) of the Act (App. B, p. 10a). Petitioner's contention is that the vessel should have been sold to it at the "statutory sales price" of $640,000, fixed by the opening paragraph of section 3(d) and by section 4(a) of the Act (App. B, pp. 9a and 11a), and that the Commission overcharged petitioner to the extent of $53,862.

Petitioner brought suit below, under 28 U.S.C. 1491, to recover this overcharge. The issue of statutory construction, together with the issue of "voluntary payment," were presented to the court below on the

Government's motion for summary judgment. The court found the issue of statutory construction against the petitioner, and dismissed its petition by decision dated January 15, 1958. The court did not deal with the issue of "voluntary payment." Petitioner filed timely motion for rehearing on February 14, 1958, which was denied May 7, 1958. In its order denying rehearing, the court deleted certain paragraphs of its earlier opinion and substituted revised paragraphs (R. 300-301).

The court said that the contentions of petitioner with respect to statutory construction were supported by the legislative history and by the language of the statute. However, finding that the precise problem involved had not been considered by Congress at the time the legislation was enacted, the court proceeded to look into the post-enactment legislative history in an effort to determine what Congress would have done if it had been aware of the problem. It decided that Congress would have intended to charge petitioner the higher price for the vessel.

Petitioner submits that the court was not authorized to speculate from post-enactment legislative history (which, in any event, was inconclusive) as to the intent of Congress to reach a conclusion which was inconsistent with the pre-enactment legislative history and also in contravention of the express language of the statute.

ARGUMENT IN SUPPORT OF GRANTING OF WRIT

A. THE COURT OF CLAIMS PROPERLY FOUND THAT THE STATUTE AND LEGISLATIVE HISTORY REFLECTED THE INTENT THAT THE "STATUTORY SALES PRICE" WAS THE MAXIMUM PRICE WHICH MARITIME WAS PERMITTED TO CHARGE UNDER THE SHIP SALES ACT

1. The language of the statute.

As pointed out above, the Merchant Ship Sales Act provides for two sets of prices—one referred to as the "statutory sales price," and the other as the "floor price." The "statutory sales price" is fixed by section 3(d) at 50% of the "prewar domestic cost," i.e., at 50% of the cost of building a vessel of a given type in the United States in 1941. The "floor price" is fixed by the last paragraph of section 3(d) at 35% of the "domestic war cost," *i.e.*, the wartime cost of constructing the same vessel in the United States, as defined by section 3(e) of the Act (App. B, p. 11a).

Section 4(a) of the Act (App. B, p. 11a) provides in unmistakably mandatory terms that, where a citizen-applicant is found to be qualified by experience, finances, operating ability, etc.:

> ". . . the Commission *shall sell* such vessel to the applicant *at the statutory sales price*."*

Section 3(d) of the Act (App. B, p. 9a) defines "statutory sales price" (unadjusted) as follows:

> "Statutory sales price," as applied to a particular vessel, means, in the case of a dry cargo vessel, an amount equal to 50 per centum of the prewar domestic cost of that type of vessel . . ."

The statutory sales price of the C1-M-AV1 type vessel determined under section 3(d) was $640,000, this being

* Emphasis supplied in all quotations unless otherwise noted.

50% of the prewar domestic cost of $1,280,000 determined according to section 3(c) (R. 21).

Section 3(d) also provides for upward and downward adjustments in the statutory sales price for the value of desirable features and depreciation. Petitioner's vessel neither contained nor lacked desirable features, and the only applicable deduction is therefore 5% depreciation, pursuant to section 3(d)(4). This would amount to approximately $90,000 since the vessel was two years and ten months old when purchased. This deduction would reduce the unadjusted statutory sales price of the vessel from $640,000 to $550,000, except for the application of the floor price provision contained in the last paragraph of section 3(d), reading as follows:

> "*No adjustment* . . . shall be made under this Act which will result in a statutory sales price which . . . will be less than 35 per centum of the domestic war cost . . ."

The preliminary domestic war cost of the C1-M-AV1 vessel was reported to Congress at approximately $1,700,000 (which, at 35%, would have produced a floor price of $612,000) (Plaintiff's Exh. 3). The final domestic war cost was determined, after passage of the Act, to be $1,982,464, and the floor, at 35% thereof, to be $693,862, which petitioner was charged (R. 21). The domestic war cost was thus $282,464 more than the domestic war cost figure reported to Congress, and the floor was $81,862 higher. This result was wholly unexpected and was due to abnormal war cost factors applied by the Commission as to a few types of vessels (R. 191-198). The floor was also $53,862 higher than the unadjusted statutory sales price of $640,000, the

maximum price reported to Congress (Plaintiff's Exh. 3). The floor was also about $143,000 higher than the statutory sales price of petitioner's vessel adjusted for depreciation.

The Maritime Commission's position was that the statutory sales price became "inapplicable" and the higher floor price controlled (R. 21). Thus, $53,862 was *added by Maritime to the unadjusted statutory sales price*, because the floor price unexpectedly exceeded the unadjusted statutory sales price. This administrative construction was precipitously adopted to forestall any possible contrary legal opinion on the subject (R. 217-220).

The "unadjusted statutory sales price" was $640,000, and the $90,000 of depreciation could not be deducted because the floor price was higher than the statutory sales price. Thus, no "adjustment" was made, and this was fully consistent with and gives effect to the floor price provision contained in the last paragraph of section 3(d), stating that "no adjustment . . . shall be made under this Act which will result in a statutory sales price" of less than 35% of the domestic war cost.

The floor thus served to prevent adjustments from reducing the unadjusted statutory sales price below the specified price, but it was obvious that it was never intended to raise the unadjusted statutory sales price. The use of the "no adjustment" language must be read to limit the scope of the floor price clause.

2. The legislative history.

Petitioner submitted to the court below exhaustive extracts from the legislative history (R. 164-198) con-

clusively showing that Congress intended that the *maximum* price to be charged for the vessels was the "statutory sales price." Petitioner also showed that there were three basic underlying policies behind the Act supporting its interpretation of the statutory language. These basic policies were that:

(1) It was the express policy of Congress that citizen shipowners be entitled to purchase war-built vessels at a price equal to 50% of foreign cost, in order that their initial postwar capital investment in ships would approximate that of their foreign competitors who could acquire vessels abroad at half of United States construction costs. The court below so found, stating (App. A, pp. 2a-3a; R. 282-3):

> "In the drafting of this statute, Congress recognized that the pre-war cost of building a dry-cargo ship in an American yard was about twice the cost in a foreign yard. If ships could be sold at all at American prices, the purchaser would be saddled with a capital investment which would handicap him in his operation in competition with foreign built ships.
>
> * * * * *
>
> In the discussion of the bill which resulted in the Merchant Ship Sales Act, there was emphasis on the purpose, noted above, not to require American enterprises to make a capital investment in their ships which would handicap them in their competition with foreign companies. H. Rept. No. 834, 79th Cong., 1st Sess., pp. 4-7. The 50% of pre-war domestic cost figure was regarded as the measure of the investment of foreign companies. If Americans were required to pay more than that 50%, that policy would, to that extent, be violated. . . ."

But the decision of the court below results in a cost of the vessel to petitioner in excess of that shown to be intended.

(2) It was the express policy of Congress that the extraordinary cost of shipbuilding during the war should not be imposed upon the postwar merchant marine, but should be borne by the Government. This the court below found, stating (App. A, pp. 3a-4a; R. 283):

> "In the discussion of the bill, the intent was expressed that the extraordinary cost of shipbuilding during the war should not be saddled upon the post war merchant marine, but should be borne by the Government. S. Rept. 807, 79th Cong., 1st Sess., pp. 2-3."

But the decision of the court below results in petitioner paying a price for the vessel based on war cost.

(3) The floor price provision was designed and intended only to limit downward adjustments in the statutory sales price of 50% of prewar domestic cost, and not to increase that cost. This the Court below also found, stating (App. A, p. 3a; R. 282-3):

> "In the consideration in Congress of this floor price provision, the discussion assumed that, in all cases, the 35% of domestic war cost would be lower than the 50% pre-war domestic cost, unless that 50% figure was reduced by class allowances, desirable feature allowances or depreciation. If such adjustments would have carried the price below the 35% floor, they would not be allowed to do so. The reduction process would have to stop at the floor."

But the decision of the court below permits the floor price to supersede and increase the statutory sales price.

The Court below recognized these positive indicia of legislative intent, but instead of interpreting the statute to conform therewith, the court resorted to speculation as to what Congress might have done if the exact situation had been presented to it, and came to the conclusion that Congress would have decided to reject these three underlying policies as to the few types of vessels which unexpectedly had floor prices higher than the statutory sales prices.

B. THE COURT BELOW ERRED IN RELYING ON INCONCLUSIVE POST-ENACTMENT LEGISLATIVE HISTORY TO OVERRIDE THE EXPRESS POLICIES OF THE ACT REVEALED BY THE PRE-ENACTMENT LEGISLATIVE HISTORY

We now come to consideration of the deviation by the court below from established principles of statutory construction. The court first attempted to place itself in the place of the members of Congress and speculated as to what Congress would have done if it had foreseen the instant case.* Secondly, it examined post-enactment legislative history and attempted to find out from post-enactment comment

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* "When the members of Congress were discussing the financial misfortune which the Government was suffering in selling ships for approximately one third of what the Government had paid for them a year or two before, we feel reasonably sure that a member who foresaw the instant case and reminded his colleagues that perhaps in some cases the ships would be sold for even less than this one third of the cost, would have received little support from his colleagues. We think they would have made it plain that this should not happen, although by doing so they would have been, to a degree, departing from some of the policies of the Act." (R. 284)

what Congress would have intended had it been aware of the problem.*

With respect to speculation as to what Congress would have done in these circumstances, the court apparently relied upon references to legislative history cited by the Government indicating that Congress inserted the floor price in order to obtain maximum prices for the vessels, and for the purpose of preventing "give-away" prices. But these conclusions by no means follow the legislative history. This is so for two reasons. The first is that before the floor prices were even discussed or injected into the Act at all, Congress had after long deliberation fixed statutory sales prices, which they were specifically told would be *maximum* prices. The second is that the floor price concept was premised on the fact that the floors would all be *less* than the statutory sales prices,** and the

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*"We think that this post-enactment legislative history is of considerable weight in showing what Congress intended, or what it would have intended, if it had, at the time of enactment of the Merchant Ship Sales Act, been aware of the problem." (R. 285)

**"REPRESENTATIVE KEOGH: Admiral, it is the impression of some, as a result of your testimony last Wednesday morning, when the thought of these floors was first suggested, that you otherwise indicated that draft No. 6 seemed to be a pretty good bill. My question is this: *Did you contemplate that the bill should have a statutory sales price fixed and also the floor below which that sales price could not be adjusted?*

ADMIRAL LAND: I thought that my comments were addressed to No. 7 when I said it was a good bill, because, in my judgment, it has to have a floor in it . . . If No. 6 had in it . . . the floor, why I thought it was a workable bill.

REPRESENTATIVE KEOGH: I find it difficult to reconcile in my own mind adopting the theory of statutory sales price, which is a fixed price, and then having a floor. *If you have a floor, the only*

entire discussion of the floors being minimum prices took place in the background of Congress' assuming the floor to be lower.*

From the foregoing, it is an inescapable conclusion that the statutory sales prices were not considered "give-away" prices (R. 177-183); and, *a fortiorari*, it is contrary to the congressional intent to construe the statute so as to permit the floor (or minimum) price to supersede the maximum price when the statutory language may be consistently construed to conform with the Congress' expressed intent. Congress was dealing with 4,000 vessels having an aggregate value of $15,000,000,000, and it cannot be assumed that Congress would have departed from the clearly expressed basic concepts of its surplus ship disposal plan in order to obtain a few thousand dollars more for the few vessels which unexpectedly turned out to have floor prices higher than the statutory sales prices.

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effect of that floor is to limit the amount of the adjustments that can be made below the statutory sales price.

ADMIRAL LAND: That was introduced because of the fact that . . . you have got the statutory sales price with the depreciation to such a low mark that the Commission could not justify it . . .

* * * * *

REPRESENTATIVE KEOGH: Would you not accomplish the same objective if you specifically limit in the bill the amount of depreciation that could be allowed?

ADMIRAL LAND: Yes, that could be accomplished . . ."

House Committee on Merchant Marine & Fisheries, Doc. No. 45, 79th Cong., 1st Sess., pp. 3-4. The hearings on the floor price, which were held June 20, 1945, are reproduced in full in petitioners Exhibit 1, submitted to the Court of Claims and a part of the record submitted in support of this petition.

* See quotation from Court of Claims opinion, *supra*, p. 9.

As pointed out above, the court below was also in error in examining post-enactment legislative history in order to find endorsement of the Maritime Commission's policy of selling the vessels for the higher prices. The post-enactment legislative history shows that a subcommittee of the House of Representatives considered the advisability of an amendment to the Act to deal specifically with those instances where the floor price of a vessel exceeded the statutory sales price (R. 98-202, 293-295). No public hearings were held, and the Maritime Commission witnesses simply maintained that their interpretation of the law was the correct one. The court below relied on this legislative history to support its conclusion as to:

> ". . . what Congress intended, or what it would have intended, if it had, at the time of enactment of the Merchant Ship Sales Act, been aware of the problem." (App. A, p. 6a; R. 285)

It seems clear that the consideration of the advisability of an amendment to the Act has no relevancy to the intent of Congress in passing the Act. It has been said with respect to an amendment actually submitted to Congress,

> "If the failure of enactment of every amendment offered for the consideration of Congress were necessarily held to shed light on the legislation sought to be amended, the search for congressional intent would be endless and fruitless." *United States* v. *Guerlain, Inc.*, 155 F. Supp. 77, 82 (S.D.N.Y. 1957).

Post-enactment legislative history thus reveals mere acquiescence by three members of a congressional committee (R. 198-204) in Maritime's desire to charge more for the vessels. Such acquiescence cannot bind the

Congress which passed the Act, and cannot be assumed to represent its will or intent in the face of the pre-enactment history which reveals directly the opposite. If post-enactment comment on legislation may be relied upon to determine the rights of United States citizens under the laws of Congress, then the legislative process becomes precarious and will be hopelessly undermined.

There is no basis for concluding that if the normal legislative procedures had been followed in dealing with the problem presented in this case, allowing for full hearings and debate, either the committees of Congress dealing with the legislation, or Congress itself would have abandoned the policies which led to fixing the statutory sales price (50% of prewar domestic cost) as the base price. Rather, it must be assumed from the pre-enactment legislative history that Congress, after hearing industry, labor, Government, and other witnesses who testified before the Act was passed, intended to treat all purchasers alike insofar as basic price was concerned, and did not intend to make an inconsistent exception as to the few vessels which later turned out to deviate from the basic pattern. Speculation as to what Congress might have done had the matter been formally considered by Congress, cannot be accepted as the equivalent of congressional action.

The substitution of a highly speculative assumption as to what Congress would have intended for the unambiguously expressed intent is judicial legislation and manifestly improper. The "judicial function [is] to apply statutes on the basis of what Congress has written, not what Congress might have written". *United States* v. *Great Northern Railway Co.*, 343 U.S.

562, 575 (1952). Accord: *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 395 (1956); *Lewyt Corp.* v. *Commissioner*, 349 U.S. 237, 240 (1955); *Bruner* v. *United States*, 343 U.S. 112, 116 (1952); *Barr* v. *United States*, 324 U.S. 83, 90 (1945). As this Court said in *Phelps Dodge Corp.* v. *National Labor Rel. Bd.*, 313 U.S. 177, 194 (1941):

> . . . courts . . . must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy."

It was further error to ignore the fact that the specific situation involved in this case was fairly encompassed by the language of the statute, and certainly clearly encompassed by positive indicia in the legislative history. Where "Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislatures." *Barr* v. *United States*, *supra*.

Where Congress is not aware of the facts "it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U.S. 61, 69 (1946). Accord: *Order of Railway Conductors* v. *Swan*, 329 U.S. 520, 529 (1947); *Interstate Commerce Commission* v. *Railway Labor Association*, 315 U.S. 373, 378 (1942); *Helvering* v. *Hallock*, 309 U.S. 106, 119, 120 (1940). See also *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533 (1947); *Sims* v. *United States*, 252 F. 2d 434, 438-439 (4th Cir. 1958).

It is obvious that the administrative construction of the Commission (R. 218-220) is entitled to no weight,

since it was plainly erroneous, and motivated, not by examination of the intent of Congress, but only by a desire to charge the higher price. *Jewell Ridge Coal Corp.* v. *Local No. 6167*, 325 U.S. 161, 169 (1945); *Neuberger* v. *Commissioner*, 311 U.S. 83, 89 (1940); *Hagger Co.* v. *Helvering*, 308 U.S. 389, 398 (1940); *Louisville & Nashville R. Co.* v. *United States*, 282 U.S. 740, 759 (1931); *United States* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 279, 280 (1929); *Houghton* v. *Payne*, 194 U.S. 88, 99, 100 (1904); *Studebaker* v. *Perry*, 184 U.S. 258, 268, 269 (1902); *United States* v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1824).

C. CONCERNING VOLUNTARY PAYMENT

Respondent argued in the court below that petitioner had "acquiesced," and voluntarily paid more for the vessel than the statute required, and that it was therefore barred from recovery. The court below did not deal with this point, and it is plain from decisions in other cases arising under the Ship Sales Act that it did not consider this defense available to defeat a claim founded on an overpayment of price fixed by statute. *A. H. Bull Steamship Co.* v. *United States*, 108 F. Supp. 95 (1952); *Southeastern Oil Florida, Inc.* v. *United States*, 119 F. Supp. 731 (1953); *cert. denied*, 348 U.S. 834 (1954); *Dichmann, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (S.D.N.Y. 1956). See also cases cited at R. 209-216.

CONCLUSION

The decision below involves not only a question of statutory construction affecting other cases involving substantial amounts of money, but, more importantly, is a precedent for judicial excursions into speculative, hypothetical and irrelevent areas of post-enactment legislative history and comment in search for a statutory interpretation admittedly contrary to the intent of Congress.

It is requested that this petition for writ of certiorari be granted.

Respectfully submitted,

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August 5, 1958

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 190-54

(Decided January 15, 1958)

ALASKA STEAMSHIP COMPANY v. THE UNITED STATES

Mr. J. Franklin Fort, for the plaintiff. *Messrs. Kominers & Fort* were on the briefs.

Mr. Justin S. Colin, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant. *Mr. Stephen C. Bransdorfer* was on the briefs.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, a corporation of the State of Washington, seeks to recover $53,862 plus any interest allowable thereon, which it claims the defendant, acting through the Maritime Commission and later the Maritime Administration, overcharged it for the purchase of a vessel.

The plaintiff, on July 16, 1948, purchased a standard C1-M-AV1 type dry-cargo vessel called the *Terminal Knot* from the Maritime Commission under the Merchant Ship Sales Act of 1946, 60 Stat. 41, 50 U. S. C. App. 1735 *et seq.* We have had occasion to consider this statute in a number of cases. See *A. H. Bull Steamship Co.* v. *United States*, 123 C. Cls. 520; *Southeastern Oil Florida, Inc.* v. *United States*, 127 C. Cls. 409; and two cases this day decided, *Nautilus Shipping Corporation* v. *United States*, Nos. 143-53, 112-55,

279-56, and *Milton C. Jackson, Syndicate Manager* v. *United States; Southern Trading Company, by Milton C. Jackson, Receiver* v. *United States*, Nos. 389-55, 261-57. The Act provided for the sale of the Government's merchant ships, acquired for war purposes, to private owners. It set formulas by which sale prices could be determined without, or with a minimum of haggling between the Maritime Commission, which was the Government's sales agency, and the purchaser.

In the drafting of this statute, Congress recognized that the pre-war cost of building a dry-cargo ship in an American yard was about twice the cost in a foreign yard. If ships could be sold at all at American prices, the purchaser would be saddled with a capital investment which would handicap him in his operation in competition with foreign built ships. Section 3 (d) of the Act provided that the "statutory sales price" of dry-cargo ships should be 50% of the pre-war domestic cost of that type of ship. In subsections 1 to 4, it provided for further deductions, in proper cases, from that 50% price. These deductions were for the cost of putting the vessels in class, for the lack of desirable features standard to that type of vessel, and for depreciation. It was recognized that the allowable deductions, particularly the deduction for depreciation, might carry the sales price very low and thus induce purchasers to select the older ships with the greatest depreciation. The Government, however, wanted to get the newer and better ships into private operation in order to build up a reputable American merchant fleet. For this reason, and for the further reason that there were members of Congress who feared that the whole sales program might be something of a giveaway, considering that the actual cost of building ships during the war was greater than the pre-war cost on which the 50% figure was based, a floor or absolute minimum sales price was set. Section 3 (d), in its last paragraph, provides that no adjustment should be made which would

carry the sales price below, in the case of dry-cargo vessels, 35% of the domestic war cost of such vessels.

In the consideration in Congress of this floor price provision, the discussion assumed that, in all cases, the 35% of domestic war cost would be lower than the 50% pre-war domestic cost, unless that 50% figure was reduced by class allowances, desirable feature allowances or depreciation. If such adjustments would have carried the price below the 35% floor, they would not be allowed to do so. The reduction process would have to stop at the floor.

In the instant case, because of the unusually high cost of building ships of the type in question late in the war period, 35% of the domestic war cost of the ship was $53,862 more than 50% of the pre-war domestic cost. That meant, of course, that no reduction could be taken for class allowances, absence of standard desirable features, or depreciation, and the plaintiff does not claim any such reduction. But the plaintiff does claim that it could not be required, under the statute, to pay more than 50% of the pre-war domestic cost prescribed in section 3 (d). Stated graphically, the plaintiff says that it was entitled to buy the ship for less than the floor price.

There are things to be said for the plaintiff's position. In the discussion of the bill which resulted in the Merchant Ship Sales Act, there was emphasis upon the purpose, noted above, not to require American enterprises to make a capital investment in their ships which would handicap them in their competition with foreign companies. H. Rept. No. 831, 79th Cong., 1st Sess., pp. 4-7. The 50% of pre-war domestic cost figure was regarded as the measure of the investment of foreign companies. If Americans were required to pay more than that 50%, that policy would, to that extent, be violated. In the discussion of the bill, the intent was expressed that the extraordinary costs of shipbuilding during the war should not be saddled upon the

post war merchant marine, but should be borne by the Government. S. Rept. 807, 79th Cong., 1st Sess., pp. 23.

In the text of section 3 (d), we have the general statement of the "statutory sales price" of 50% and then the statement "such amount in each case being adjusted as follows: * * *." Then we have the three provisions for reductions from the 50% figure, *viz.*, for class allowances, absence of standard desirable features, and depreciation. Then we have the statement "No adjustment * * * shall be made under this Act which will result" in a sales price of less than 35% of the domestic war cost. The word "adjustment" last quoted would seem to have reference to those items covered by the immediately preceding paragraphs, which were introduced by the phrase "adjusted as follows."

Section 4 of the Act says that the Maritime Commission shall sell ships to any citizens who are properly qualified "at the statutory sales price." This obviously does not refer to the 50% figure, though in section 3 that is called the "statutory sales price," because farther on in section 3 are the provisions for the adjustments which are mandatory and which will reduce, or, in one instance not here relevant, increase the 50% figure, and the provision for the 35% floor figure. The "statutory sales prices" referred to in section 4 must be the price which will be arrived at by applying the provisions of the statute. It is thus of no help to us in determining what the statute means.

When members of Congress were disturbed because it seemed that ships built at great cost during the war were about to be sold for a minor fraction of their cost, the floor price, based upon that actual war cost, was inserted in the bill to reassure them. As we have said, it was assumed in the discussion that this floor price would always be a stopping place in the process of reduction from a higher starting point, and the possibility that the floor as an obstruction to descent might be avoided by starting below the floor did not occur to them.

In the circumstances, the text of the statute not giving a clear answer, and there being no Congressional intent pointed at the particular problem, the best we can do is to determine, as best we can, what Congress would have intended if it had put its mind to the problem. Our conclusion is that it would have intended that ships should not be sold at less than the floor price.

When the members of Congress were discussing the financial misfortune which the Government was suffering in selling ships for approximately one third of what the Government had paid for them a year or two before, we feel reasonably sure that a member who foresaw the instant case and reminded his colleagues that perhaps in some cases the ships would be sold for even less than this one third of the cost, would have received little support from his colleagues. We think they would have made it plain that this should not happen, although by doing so they would have been, to a degree, departing from some of the policies of the Act.

Shortly after the Act was passed, situations involving the question which concerns us here began to come to light. When the House of Representatives passed the Act, it set up a special subcommittee to observe the administration and operation of the Act. At the committee's first hearing, it was informed that the floor prices of three types of vessels, including the type involved in this case, would exceed 50% of the pre-war domestic cost, i.e., the unadjusted statutory sales price. See Watchdog Committee Hearings, April 5, 6, 1946, pp. 1-2. The subcommittee did not question the propriety of these prices. On the contrary, it approved the Commission's proposal to raise the floor price by including certain additional items in computing the domestic war cost of the vessels. *Id.*, p. 22.

At the subcommittee's next hearing it considered the advisability of an amendment to the Act which would permit the Commission to sell these types of vessels at less than the

floor price. Watchdog Committee Hearings, June 4, 1946, pp. 6-7. The committee requested and obtained the views of the Commission, which were adverse to the amendment. No action was taken on the proposed amendment.

The Government cites other actions by the Watchdog Committee and by Congress which show that both were aware that the Commission was adhering to the floor price even when it was higher than the unadjusted statutory sales price. We think that this post-enactment legislative history is of considerable weight in showing what Congress intended, or what it would have intended, if it had, at the time of enactment of the Merchant Ship Sales Act, been aware of the problem.

Our conclusion is that the plaintiff was not overcharged for its ship. The defendant's motion for a summary judgment is granted, and the plaintiff's petition is dismissed.

It is so ordered.

WHITAKER, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge* concur.

LARAMORE, *Judge*, took no part in the consideration and decision of this case.

IN THE UNITED STATES COURT OF CLAIMS

No. 190-54

ALASKA STEAMSHIP COMPANY v. THE UNITED STATES

Order

This case comes before the court on plaintiff's motion filed February 14, 1958, for rehearing, together with defendant's response thereto. Upon consideration thereof,

IT IS ORDERED this seventh day of May, 1958, that plaintiff's motion for rehearing be and the same is denied, and

IT IS FURTHER ORDERED that the first two paragraphs appearing on the last page of the slip opinion of January 15, 1958, be and the same are deleted in their entirety and the following substituted in their place:

> Shortly after the Act was passed, situations involving the question which concerns us here began to come to light. When the House of Representatives passed the Act, it set up a special subcommittee to observe the administration and operation of the Act. See Watchdog Committee Hearings, April 5, 6, 1946, pp. 1-2. At the committee's first hearing, a chart was presented which showed the domestic war cost and floor prices of three types of vessels, including the type involved in this case, and these floor prices were higher than the unadjusted statutory sales prices which had on several occasions been reported to Congress. *Id.*, p. 22. The subcommittee did not question the propriety of these prices. On the contrary, it

approved the Commission's proposal to raise the floor price by including certain additional items in computing the domestic war cost of the vessels. *Id.*, p. 22.

At the subcommittee's next hearing it considered the advisability of an amendment to the Act which would permit the Commission to sell these types of vessels at less than the floor price. Watchdog Committee Hearings, June 4, 1946, pp. 6-7. The committee requested and obtained the views of the Commission, which were adverse to the proposal to amend. No action was taken on the proposal.

By the Court

Marvin Jones,
Chief Judge.

APPENDIX B

Relevant Provisions of the Merchant Ship Sales Act of 1946

60 Stat. 41; 50 U.S.C. App. 1735 *et seq.*

Definitions

Sec. 3. As used in this Act the term—

(a) 'Commission' means the United States Maritime Commission.

(b) 'War-built vessel' means an ocean-going vessel of one thousand five hundred gross tons or more, owned by the United States and suitable for commercial use—

(1) which was constructed or contracted for by or for the account of the United States during the period, beginning January 1, 1941, and ending with September 2, 1945; or

(2) which, having been constructed during the period beginning September 3, 1939, and ending with September 2, 1945, was acquired by the United States during such period.

(c) 'Prewar domestic cost', as applied to any type of vessel, means the amount determined by the Commission, and published by the Commission in the Federal Register, to be the amount for which a standard vessel of such type could have been constructed (without its national defense features) in the United States under normal conditions relating to labor, materials, and other elements of cost, obtaining on or about January 1, 1941. In no case shall the prewar domestic cost of any type of vessel be considered to be greater than 80 per centum of the domestic war cost of vessels of the same type.

(d) 'Statutory sales price', as applied to a particular vessel, means, in the case of a dry-cargo vessel, an amount equal to 50 per centum of the prewar domestic cost of that type of vessel, and in the case of a tanker, such term means an amount equal to 87½ per centum of the prewar domestic cost of a tanker of that type, such amount in each case being adjusted as follows:

(1) If the Commission is of the opinion that the vessel is not in class, there shall be subtracted the amount estimated by the Commission as the cost of putting the vessel in class.

(2) If the Commission is of the opinion that the vessel lacks desirable features which are incorporated in the standard vessel used for the purpose of determining prewar domestic cost, and that the statutory sales price (unadjusted) would be lower if the standard vessel had also lacked such features, there shall be subtracted the amount estimated by the Commission as the amount of such resulting difference in statutory sales price.

(3) If the Commission is of the opinion that the vessel contains desirable features which are not incorporated in

the standard vessel used for the purpose of determining prewar domestic cost, and that the statutory sales price (unadjusted) would be higher if the standard vessel had also contained such features, there shall be added the amount estimated by the Commission as the amount of such resulting difference in statutory sales price.

(4) There shall be subtracted, as representing normal depreciation, an amount computed by applying to the statutory sales price (determined without regard to this paragraph) the rate of 5 per centum per annum for the period beginning with the date of the original delivery of the vessel by its builder and ending with the date of sale or charter to the applicant in question, and there shall also be subtracted an amount computed by applying to the statutory sales price (determined without regard to this paragraph) such rate not in excess of 3 per centum per annum in the case of a vessel other than a tanker, and not in excess of 4 per centum per annum in the case of a tanker, for such period or periods of war service as the Commission determines will make reasonable allowance for excessive wear and tear by reason of war service which cannot be or has not been otherwise compensated for under this subsection.

No adjustment, except in respect of passenger vessels constructed before January 1, 1941, shall be made under this Act which will result in a statutory sales price which (1) in the case of dry-cargo vessels (except Liberty type vessels) will be less than 35 per centum of the domestic war cost of vessels of the same type, (2) in the case of any Liberty type vessel will be less than 31½ per centum of the domestic war cost of vessels of such type, or (3) in the case of a tanker will be less than 50 per centum of the domestic war cost of tankers of the same type. For the purposes of this Act, except section 5, all Liberty vessels shall be considered to be vessels of one and the same type.

(e) 'Domestic war cost' as applied to any type of vessel means the average construction cost (without national defense features) as determined by the Commission, of vessels of such type delivered during the calendar year 1944, except in case of any type of vessel the principal deliveries of which were made after the calendar year 1944, there shall be used in lieu of such year 1944 such period of not less than six consecutive calendar months as the Commission shall find to be most representative of war production costs of such type.

* * * * * *

SALES OF WAR-BUILT VESSELS TO CITIZENS

SEC. 4. (a) Any citizen of the United States may make application to the Commission to purchase a war-built vessel, under the jurisdiction and control of the Commission, at the statutory sales price. If the Commission determines that the applicant possesses the ability, experience, financial resources, and other qualifications, necessary to enable him to operate and maintain the vessel under normal competitive conditions, and that such sale will aid in carrying out the policies of this Act, the Commission shall sell such vessel to the applicant at the statutory sales price.

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No. 256

In the Supreme Court of the United States

OCTOBER TERM, 1958

ALASKA STEAMSHIP COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 256

ALASKA STEAMSHIP COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-6a), modified by order of May 7, 1958 (Pet. App. 7a-8a), is reported at 158 F. Supp. 361.

JURISDICTION

The judgment of the Court of Claims was entered on January 15, 1958. A petition for rehearing, filed February 14, 1958, was denied on May 7, 1958. The petition for a writ of certiorari was filed on August 5, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. Whether, by Section 3 (d) of the Merchant Ship Sales Act of 1946, Congress imposed a floor or mini-

mum sale price below which war-built vessels subject to sale under the Act could not be sold.

2. Whether, in any event petitioner, having accepted the Maritime Commission's contract terms for the sale of a vessel and having voluntarily paid the sale price, is now estopped to contend that it was entitled to a lower price.

STATUTE INVOLVED

Sections 3 and 4 of the Merchant Ship Sales Act of 1946, 60 Stat. 41–43, 50 U. S. C. App. 1736, 1737, are set forth in the Appendix, *infra*, pp. 12–16.

STATEMENT

This action was brought by petitioner to recover $53,862, allegedly representing the amount by which it was overcharged in the purchase of a war-built vessel owned by the United States. The facts underlying the claim are brief and not in dispute.

Pursuant to petitioner's application and offer of July 13, 1948, the Maritime Commission, on July 15, 1948, approved the sale to petitioner of the war-built Cl-M-AV1 vessel, *Terminal Knot*, at a price of $693,862. The sale price of the vessel conformed to the floor price for vessels of the Cl-M-AV1 type previously fixed by the Maritime Commission and published in the Federal Register (11 Fed. Reg. 4702). By its petition (R. 1–4) filed in the Court of Claims on May 24, 1954, petitioner alleged that the sale price was $53,862 in excess of the price authorized by Section 3 of the Merchant Ship Sales Act of 1946.

On the Government's motion for summary judgment, the Court of Claims dismissed the petition (Pet. App. 6a), holding (Pet. App. 1a–6a) that the

price paid by petitioner for the *Terminal Knot* was correctly determined by the Maritime Commission, in conformity with Section 3 of the Act, and that petitioner therefore was not overcharged.

ARGUMENT

1. The only question decided below—whether petitioner was overcharged for the *Terminal Knot*—is of no general importance. The governing statutory authority expired in 1951;[1] and, to the best of our knowledge, there are only six other claims before the Court of Claims which are or may be directly affected by the decision below.[2] These six claims, involving 21 vessels, aggregate approximately $900,000.[3] Moreover, as the decision below holds, petitioner was not overcharged.

---

[1] Section 14 of the Merchant Ship Sales Act of 1946, 60 Stat. 50, provided that no contract of sale or of charter shall be made under the Act after December 31, 1947. The termination date for contracts of sale and contracts of charter was extended to January 15, 1951, and June 30, 1950, respectively, by the Acts of June 28, 1947, § 1, 61 Stat. 190; Feb. 27, 1948, § 1 (a), 62 Stat. 38; Feb. 28, 1949, 63 Stat. 9; June 29, 1949, § 1, 63 Stat. 349; June 30, 1950, § 1, 64 Stat. 308; Aug. 17, 1950, 64 Stat. 452.

[2] *Farrell Lines, Inc.* v. *United States*, No. 170-55; *Moore-McCormack Lines, Inc.* v. *United States*, No. 116-65; *American President Lines, Ltd.* v. *United States*, No. 63-56; *Moore-McCormack Lines, Inc.* v. *United States*, No. 118-56; *Southern Steamship Company* v. *United States*, No. 655-53; *New York & Cuba Mail Steamship Company* v. *United States*, No. 132-55.

[3] Petitioner's statement (Pet. 3) that the "Government contends that at least $6,000,000 is involved in this question of statutory construction" is misleading. The $6,000,000 to which petitioner refers was a very rough approximation, made by the Government (R. 26), of the total difference between the statutory sales price (unadjusted) and the statutory floor price for *all* vessels sold by the United States at floor prices.

(*a*) Section 4 of the Merchant Ship Sales Act of 1946 (Appendix, *infra*, p. 15) directed the United States Maritime Commission[*] to sell war-built ships to qualified purchasers at a "statutory sales price." Section 3 (d) of the Act (Appendix, *infra*, pp. 12–13) defined a "statutory sales price" in terms of a percentage—50 per centum in the case of a dry-cargo vessel—of "prewar domestic cost." "Prewar domestic cost" was to be the cost, as estimated by the Commission, of constructing a hypothetical dry-cargo vessel in American shipyards under conditions prevailing on January 1, 1941.

After thus calculating the standard "statutory sales price," the Commission was to make certain adjustments, as they might apply to each vessel sold. These adjustments were: (1) a deduction for depreciation, according to the age of the ship; (2) a deduction for estimated cost of putting the ship "in class;" (3) a deduction for the cost of installing "desirable features" (other than features necessary to put the vessel in class) that might be present in the Commission's hypothetical standard vessel but absent from the particular vessel sold; and (4) an increment to cover the value of desirable features contained in the vessel sold and lacking in the standard vessel.

Finally, Section 3 (d) provided (with an exception not relevant here) that:

> No adjustment [in determining the statutory sales price] * * * shall be made under this

[*] The United States Maritime Commission was abolished in 1950 by Reorganization Plan No. 21, effective May 24, 1950, 15 Fed. Reg. 3178, 64 Stat. 1273. The functions of the Commission were transferred to the Secretary of Commerce, acting through the Maritime Administration. *Ibid.*

> Act which will result in a statutory sales price which (1) in the case of dry-cargo vessels [*e. g.*, the *Terminal Knot*] * * * will be less than 35 per centum of the domestic war cost of vessels of the same type * * *.[5]

The clear effect of this provision, we submit, was to fix a statutory minimum or floor upon the sales price of vessels subject to sale under the Act, and accordingly the Court of Claims correctly determined petitioner was not overcharged when it purchased the *Terminal Knot* in 1948.

The Commission's estimated cost of a C1-M-AV1 type vessel, such as the *Terminal Knot*, was $1,280,000; a statutory sales price computed on the basis of 50 per centum of the 1941 estimated cost was, therefore, $640,000. The "domestic war cost" of a C1-M-AV1 vessel was, however, $1,982,464, and 35 per centum of this figure yielded a sales price of $693,862. (Pet 5-6.) Since the statutory sales price based on prewar domestic costs and before downward adjustments was $53,862 less than 35 per centum of war cost, the Commission, because of the floor or minimum price provision in Section 3 (d), was required to sell, and petitioner agreed to buy, at the higher figure.

(*b*) Petitioner's argument that the statutory sales price for the *Terminal Knot* was $640,000, or 50 per centum of the prewar domestic cost of C1-M-AV1 vessels, presupposes that the statutory limitation, based upon the actual domestic war cost of the vessel,

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[5] "Domestic war cost," as used in Section 3 (d), "means the average construction cost * * * as determined by the Commission, of vessels * * * delivered during the calendar year 1944 * * *." Section 3 (e), Appendix, *infra*, p. 14.

is a limitation or floor only upon the downward adjustments in paragraphs (1) through (4) of Section 3 (d), *supra*. Thus, it is argued (Pet. 6–7) that the statutory sales price for war-built vessels is in all cases 50 per centum of the Commission's estimated prewar domestic cost of the vessel, adjusted downward to the extent that the adjustments do not reduce the price below 35 per centum of the actual wartime cost of the vessel.

This suggested interpretation of Section 3 (d) is contrary to the legislative history of the Act, which confirms that Congress understood the 35 per centum of wartime cost limitation to be a minimum sales price for dry-cargo vessels. For example, House Rept. No. 831, 79th Cong., 1st Sess., contained a comprehensive analysis of the price provisions of H. R. 3603 (which ultimately became law) and described Section 3 (d) as establishing "* * * a floor price below which sales cannot be made. * * *" (p. 7). A similar statement is made in S. Rept. 807, 79th Cong., 1st Sess., p. 12.

To the same effect was the contemporaneous construction of the Act by the agency charged with its administration. See *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315. Within weeks after H. R. 3603 became law, the Maritime Commission published in the Federal Register (11 Fed. Reg. 4702) the sales prices for three dry-cargo type vessels (including the C1-M-AV1) fixing the sales prices for these vessels[6] at 35 per centum of domestic war costs

[6] The floor price provision was similarly applicable to the T1-M-BT tanker, the sales price for which was, in accordance

because a sales price based on 50 per centum of the estimated prewar domestic costs of these vessels would result in a substantially lower price. Between 1946 and 1951, when the Commission's authority terminated, over 100 vessels were sold at the floor prices as determined by the Commission.[7] Five times, between 1946 and 1951, Congress extended the Commission's, or its successor's, authority to enter into contracts of sale of war-built vessels[8] without any intimation by Congress that the Commission had not correctly interpreted the pricing formula in Section 3 (d).

Moreover, the Commission's floor prices with respect to C1–M–AV1 and three other type vessels were, in 1946 and 1947, brought to the attention of a Special "Watchdog" Subcommittee of the House Committee on Merchant Marine and Fisheries, set up to follow the Commission's administration of the Act (R. 131–141). Though the Subcommittee manifested some concern that the floor price might impede the sale of C1–M–AV1 and other affected vessels, and that Section 3 might, therefore, be in need of amendment, there was no suggestion that the Commission had erroneously interpreted Section 3 of the Act as enacted.[9]

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with Section 3 (d), fixed at 50 per centum of domestic war cost. 11 Fed. Reg. 4702.

[7] Annual Report of the Federal Maritime Board, Maritime Administration, 1951, App. L, pp. 111–112.

[8] See note 1, *supra*.

[9] Hearings on H. R. 3603, House Committee on Merchant Marine and Fisheries, 79th Cong., 2d Sess., June 4, 1946, pp. 6–7; Hearings, Subcommittee on Ships Sales, Charters and Lay-Ups of the House Committee on Merchant Marine and Fisheries, 80th Cong., 1st Sess., April–June 1947, pp. 52–53, 55, 105, 143.

The Commission's construction of the Act is also supported by other post-enactment legislative history.[10] Subsequent to January 15, 1951, when the ship-sale authority expired, Congress, by special acts, authorized the sale by the Maritime Administration of C1–M–AV1 vessels. Twelve vessels were authorized to be sold to the Government of Brazil at prices "determined under section 3 of the Merchant Ship Sales Act. * * *."[11] Pertinent House and Senate Reports[12] make it clear that Congress understood the Section 3 price of C1–M–AV1 vessels to be the $693,862 floor price, as determined by the Commission in 1946.[13] And, in 1956, by Private Law 629, 84th Cong., 2d Sess., 70 Stat. A55, petitioner itself was authorized to purchase two C1–M–AV1 vessels at prices which had as a base the floor price of $693,862, as determined under Section 3 of the 1946 Act."[14]

2. In its decision, the Court of Claims found it unnecessary to consider any question apart from whether petitioner was overcharged. Additional grounds for denying recovery, however, were urged below.

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[10] *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 277, "It is settled that 'subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.' *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309." See also *United States* v. *Boeing*, 256 U. S. 484; *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317, 329–330.

[11] Public Law 496, 83d Cong., 2d Sess., 68 Stat. 481, 482.

[12] H. Rept. No. 2011, 83d Cong., 2d Sess.; S. Rept. No. 1276, 83d Cong., 2d Sess.

[13] See also Public Law 665, §132, 83d Cong., 2d Sess., 68 Stat. 832, 839, providing for the sale of C1–M–AV1 vessels to the Republic of Korea at the Section 3 price.

[14] S. Rept. No. 1863, 84th Cong., 2d Sess., p. 4; H. Rept. No. 1947, 84th Cong., 2d Sess., pp. 4, 6.

Petitioner's application and offer to purchase the *Terminal Knot*, made on July 13, 1948, were made with full knowledge that the Commission's statutory sales price for the *Terminal Knot* was the published floor price of $693,862. It subsequently contracted with the Commission to purchase the *Terminal Knot* at that price without a protest or reservation of any kind and without any suggestion that the price was excessive or illegal. In these circumstances, by its prior acquiescence in the Commission's determination that the floor price was the proper price for the *Terminal Knot*, we believe that petitioner is estopped, at this late date, to challenge the correctness of the sales price.[17] In any event, even if petitioner may now challenge the correctness of the sales price and even if its interpretation of Section 3 (d) were correct, petitioner is in the position of one who has voluntarily paid money to the Government under what must have been a mistake of law and is faced with the principle that money voluntarily paid to the United States in such circumstances cannot be recovered in the absence of special statute.[18] These questions of estoppel and vol-

[17] Cf. *Callanan Road Improvement Co.* v. *United States*, 345 U. S. 507; *Commissioner* v. *National Lead Co.*, 230 F. 2d 161 (C. A. 2), affirmed on other grounds, 352 U. S. 313.

[18] *United States* v. *Edmondston*, 181 U. S. 500; *Chesebrough* v. *United States*, 192 U. S. 253; *United States* v. *New York and Cuba Mail S.S. Co.*, 200 U. S. 488, 494; *Pure Oil Co.* v. *Tucker*, 164 F. 2d 945, 947-948 (C. A. 8); *Baltimore & Ohio Railroad Co.* v. *United States*, 52 C. Cls. 468; *Miller* v. *United States*, 42 C. Cls. 121; *Elliott* v. *United States*, 37 C. Cls. 136.

In the *Edmondston case*, *supra*, this Court noted:

"It is clear from these references that this court has distinctly and constantly recognized the doctrine that where there has been a voluntary payment of money, using that term in its

untary payment, it may be noted, inhere in virtually all cases where purchasers or charterers of war-built vessels, long after the Commission's approval of the sale or charter, challenge the validity of the Commission's sale or charter terms.[17]

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customary legal sense, the money so paid cannot be recovered, and also that that doctrine applies to cases in which one of the parties is the government, and that money thus voluntarily paid to the government cannot be recovered.

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* * * In short, and to sum it up in a word, so far as we can see from this record the transaction was purely voluntary on his part, and that while there was a mistake it was mutual, and one of law—a mistake on his part not induced by any attempt to deceive or misrepresentation by the government officials. It is a case of a voluntary payment, and as such the claimant's remedy is by appeal to the discretion of Congress and not by an action in the Court of Claims." [131 U. S. at 510–511, 515.]

[17] In *Southeastern Oil Florida, Inc.* v. *United States*, 127 C. Cls. 409, certiorari denied, 348 U. S. 834, the United States sought, *inter alia*, the Court's review of these questions (No. 247, 1954 Term) and, should the present petition be granted, will urge these points in support of the result reached by the court below. See also *A. H. Bull Steamship Co.* v. *United States*, 123 C. Cls. 520; *Dichman, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (S. D. N. Y.); *American President Lines* v. *United States*, 162 F. Supp. 732 (D. Del.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

Sections 3 and 4 of the Merchant Ship Sales Act of 1946, 60 Stat. 41-43 (50 U. S. C. App. 1736, 1737), provide as follows:

DEFINITIONS

SEC. 3. As used in this Act the term—

(a) "Commission" means the United States Maritime Commission.

(b) "War-built vessel" means an oceangoing vessel of one thousand five hundred gross tons or more, owned by the United States and suitable for commercial use—

(1) which was constructed or contracted for by or for the account of the United States during the period, beginning January 1, 1941, and ending with September 2, 1945; or

(2) which, having been constructed during the period beginning September 3, 1939, and ending with September 2, 1945, was acquired by the United States during such period.

(c) "Prewar domestic cost", as applied to any type of vessel, means the amount determined by the Commission, and published by the Commission in the Federal Register, to be the amount for which a standard vessel of such type could have been constructed (without its national defense features) in the United States under normal conditions relating to labor, materials, and other elements of cost, obtaining on or about January 1, 1941. In no case shall the prewar domestic cost of any type of vessel be considered to be greater than 80 per centum of the domestic war cost of vessels of the same type.

(d) "Statutory sales price", as applied to a particular vessel, means, in the case of a dry-cargo vessel, an amount equal to 50 per centum

of the prewar domestic cost of that type of vessel, and in the case of a tanker, such term means an amount equal to 87½ per centum of the prewar domestic cost of a tanker of that type, such amount in each case being adjusted as follows:

(1) If the Commission is of the opinion that the vessel is not in class, there shall be subtracted the amount estimated by the Commission as the cost of putting the vessel in class.

(2) If the Commission is of the opinion that the vessel lacks desirable features which are incorporated in the standard vessel used for the purpose of determining prewar domestic cost, and that the statutory sales price (unadjusted) would be lower if the standard vessel had also lacked such features, there shall be subtracted the amount estimated by the Commission as the amount of such resulting difference in statutory sales price.

(3) If the Commission is of the opinion that the vessel contains desirable features which are not incorporated in the standard vessel used for the purpose of determining prewar domestic cost, and that the statutory sales price (unadjusted) would be higher if the standard vessel had also contained such features, there shall be added the amount estimated by the Commission as the amount of such resulting difference in statutory sales price.

(4) There shall be subtracted, as representing normal depreciation, an amount computed by applying to the statutory sales price (determined without regard to this paragraph) the rate of 5 per centum per annum, for the period beginning with the date of the original delivery of the vessel by its builder and ending with the date of sale or charter to the applicant in question, and there shall also be subtracted an amount computed by applying to the statutory sales price (determined without regard to this paragraph) such rate not in excess of 3

per centum per annum in the case of a vessel other than a tanker, and not in excess of 4 per centum per annum in the case of a tanker, for such period or periods of war service as the Commission determines will make reasonable allowance for excessive wear and tear by reason of war service which cannot be or has not been otherwise compensated for under this subsection.

No adjustment, except in respect of passenger vessels constructed before January 1, 1941, shall be made under this Act which will result in a statutory sales price which (1) in the case of dry-cargo vessels (except Liberty type vessels) will be less than 35 per centum of the domestic war cost of vessels of the same type, (2) in the case of any Liberty type vessel will be less than 31½ per centum of the domestic war cost of vessels of such type, or (3) in the case of a tanker will be less than 50 per centum of the domestic war cost of tankers of the same type. For the purposes of this Act, except section 5, all Liberty vessels shall be considered to be vessels of one and the same type.

(e) "Domestic war cost" as applied to any type of vessel means the average construction cost (without national defense features) as determined by the Commission, of vessels of such type delivered during the calendar year 1944, except in case of any type of vessel the principal deliveries of which were made after the calendar year 1944, there shall be used in lieu of such year 1944 such period of not less than six consecutive calendar months as the Commission shall find to be most representative of war production costs of such type.

(f) "Cessation of hostilities" means the date proclaimed by the President as the date of the cessation of hostilities in the present war, or the date so specified in a concurrent resolution of the two Houses of the Congress, whichever is the earlier.

(g) "Citizen of the United States" includes a corporation, partnership, or association only if it is a citizen of the United States within the meaning of section 2 of the Shipping Act of 1916, as amended. The term "affiliated interest" as used in sections 9 and 10 of this Act includes any person affiliated or associated with a citizen applicant for benefits under this Act who the Commission, pursuant to rules and regulations prescribed hereunder, determines should be so included in order to carry out the policy and purposes of this Act.

SALES OF WAR-BUILT VESSELS TO CITIZENS.

SEC. 4. (a) Any citizen of the United States may make application to the Commission to purchase a war-built vessel, under the jurisdiction and control of the Commission, at the statutory sales price. If the Commission determines that the applicant possesses the ability, experience, financial resources, and other qualifications, necessary to enable him to operate and maintain the vessel under normal competitive conditions, and that such sale will aid in carrying out the policies of this Act, the Commission shall sell such vessel to the applicant at the statutory sales price.

(b) At the time of sale, the purchaser shall pay to the Commission at least 25 per centum of the statutory sales price. The balance of the statutory sales price shall be payable in not more than twenty equal annual installments, with interest on the portion of the statutory sales price remaining unpaid at the rate of 3½ per centum per annum, or shall be payable under such other amortization provisions which permit the purchaser to accelerate payment of the unpaid balance as the Commission deems satisfactory. The obligation of the purchaser with respect to payment of such unpaid balance with interest shall be secured by a preferred mortgage on the vessel sold.

(c) The contract of sale and the mortgage given to secure the payment of the unpaid balance of the purchase price, shall not restrict the lawful or proper use or operation of the vessel.